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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TERRYDALE LIQUIDATING TRUST,

Petitioner,

-v-

HERBERT BARNESS, JOHN F. BISHOP, EDGAR H. CHAPPELL, CHARLES W. CORBITT, GEORGE S. MANN, BROOKS WALKER, JR., LOUIS W. WALKER, and CHARLES M. WILLIAMS, individually and as Trustees of, and DAVID B. BRYANT as Trustee of, SAN FRANCISCO REAL ESTATE INVESTORS, and KEITH L. BROWN, individually, and as SAN FRANCISCO REAL ESTATE INVESTORS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 9, 1988

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Questions Presented

1. Whether the judgment should be set aside for deliberate fraud on the court where respondent and its attorneys secretly tampered with petitioner's seven key witnesses by agreeing before trial that respondent would pay $50,000 for the witnesses' attorneys' fees?

2. Whether an award of over $1.5 million in attorneys' fees and expenses to respondent must be stricken where the respondent and its attorneys flagrantly flouted their obligations to the court (a) by illegally tampering with petitioner's witnesses and (b) by repeatedly misrepresenting and withholding critical facts as they pressed the frivolous defense of lack of personal jurisdiction for over one and one half years.

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TERRYDALE LIQUIDATING TRUST,

Petitioner,

v.

HERBERT BARNESS, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Terrydale Liquidating Trust ("Terrydale") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported (1a).[1] Some of the decisions of the district court (Sand, J.) which form the basis for this petition are reported; others are not. 642 F. Supp. 917 (S.D.N.Y. 1986), (13a); (194a); (214a); (10a).

JURISDICTION

The judgment of the Second Circuit was entered on May 12, 1988. (1a). On August 2, 1988, Justice Marshall extended the time for filing this petition to and including September 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

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[1] References to the separately bound Appendix are indicated by page number, followed by "a".

STATEMENT

This case, based on diversity jurisdiction, involves two matters of serious misconduct by respondent and its attorneys which tainted the judgment. The first involves the disclosure after trial of a secret pre-trial agreement by respondent-defendant San Francisco Real Estate Investors ("SFREI") and its attorneys, Skadden, Arps, Slate, Meagher & Flom, ("Skadden" or "Skadden Arps") for SFREI to pay $50,000 for the attorneys' fees of seven key witnesses called by petitioner-plaintiff Terrydale Liquidating Trust ("TLT").[2] The second involves respondent's and its attorneys' scheme of deliberate deception of the court and petitioner in pursuing its frivolous defense of lack of personal jurisdiction. After trial and despite this undisputed misconduct, the district court refused to grant petitioner's request for a new trial and awarded respondent $1.5 million for its attorneys' fees and expenses based upon a "prevailing party" contractual provision.

A. Background

TLT is successor in interest to Terrydale Realty Trust ("TRT"), a Missouri real estate investment trust. In response to an unsolicited tender offer for TRT shares by BCG Associates ("BCG"), the TRT trustees, in order to defeat that offer, approved the sale of four Denver office buildings (80% of TRT's assets) in February 1981 to "white knight" respondent-defendant SFREI. The TRT trustees simultaneously voted to liquidate the trust and to declare a liquidating dividend, thereby thwarting the tender offer.

The beneficiaries of TRT, now TLT, who were never given an opportunity to vote on the SFREI transaction, claimed that the TRT trustees had engaged in a "fire sale" at 50 cents on the dollar and undersold the assets by at least $14 million. TLT sued (1) the seller, the former trustees of TRT, for breach of fiduciary duty and Declaration of Trust and (2) the purchaser, SFREI, as aider

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[2] The $50,000 includes $25,000 in attorneys' fees and $1,714.15 in expenses paid by SFREI to Williams & Connolly, Esqs. on July 31,1986 (after the testimony of the seven witnesses and before decision) (146a) and $17,490 in attorneys' fees and $7,562.33 in expenses paid by SFREI to Polsinelli, White & Vardeman, Esqs. on August 27, 1986, one day after the decision in SFREI's favor (146a).

and abettor because of its knowledge of the breaches, and in any event, as constructive trustees because of its notice of TRT's breaches.

The former trustees of TRT were petitioner's key witnesses at trial: J. Russell Gramlich, his son John J. Gramlich, J. Harlan Stamper, John D. O' Flaherty, and Thomas J. Murphy. The TRT assets were managed by Terrydale Management Corporation ("TMC"), which was controlled by the Gramlich family. Two other key witnesses were Michael J. Gramlich (J.Russell Gramlich's son) and James A. Kostoryz (J. Russell Gramlich's son-in-law), vice presidents of TMC.

Petitioner called the seven key witnesses to establish material facts in the case; namely, the self-interest of certain trustees; the lack of independence of others, *i.e.* their "control and domination" by the interested trustees; and the fact that the TRT trustees acted without sufficient information about the current values of the subject properties. The district court's post-trial opinion manifests its reliance on the trial testimony of the TRT trustees (22a, 23a, 24a, 33a, 34a, 40a, 43a, 55a, 56a).

B. SFREI's and its Attorneys' Repeated Deception on the Issue of Jurisdiction

Over a year-and-a-half period, SFREI and its attorneys repeatedly and willfully deceived the district court by misrepresenting the facts material to the issue of personal jurisdiction over SFREI. Based on its misrepresentations, SFREI was successful on *two* motions to dismiss and in opposing one motion to reargue on the ground of lack of personal jurisdiction. *Bolton* v. *Gramlich*, 540 F. Supp. 822, 844-45 (S.D.N.Y. Jan. 28, 1982); *Terrydale Liquidating Trust* v. *Gramlich*, 549 F. Supp. 529, 530-31 (S.D.N.Y. July 29, 1982); (unreported order, Sept. 14, 1982).[3] SFREI and its attorneys submitted affidavits, motions and briefs falsely representing that SFREI had not transacted any business whatsoever

[3] These dismissals occurred in the predecessor action to this case; petitioner was given leave to file a new complaint.

in New York and that the subject transaction occured entirely outside New York.[4]

Contrary to SFREI's sworn assertions, SFREI's New York counsel Skadden Arps had played a critical role in the subject transaction. In November 1982, when petitioner sought discovery from Skadden on this matter, Skadden moved for a protective order arguing that discovery of Skadden was irrelevant and harassing to Skadden and SFREI. When the district court ultimately ordered Skadden to comply with discovery requests, TLT discovered that *Skadden had executed two critical agreements in New York on behalf of SFREI that were essential to consummation of the subject transaction*. In addition, Skadden lawyers conducted negotiations and drafted an underlying asset purchase agreement in New York on behalf of SFREI.

Thereafter, SFREI did not renew its motion to dismiss on jurisdictional grounds. Nevertheless, in its answer to this action signed in September 1983 by Skadden and Landels Ripley, SFREI still asserted that the court lacked personal jurisdiction. Skadden and SFREI continued to assert the frivolous defense throughout trial. The court, after trial, ruled that personal jurisdiction existed over SFREI (16a) and that SFREI's defense was "entirely devoid of merit". *Terrydale Liquidating Trust* v. *Barness*, No. 82-7920, slip. op. at 4 (S.D.N.Y. April 15, 1987).

Significantly, all of the foregoing facts are undisputed.

C. SFREI's and Skadden's Secret Agreement To Pay $50,000 In Attorneys' Fees for the Witnesses

In December 1982 the former trustees of TRT, Michael Gramlich and James Kostoryz settled with TLT. TLT continued

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[4] For example, SFREI's President, Edgar Chappell, swore by affidavit in July 1981 that SFREI had "not transacted any business within New York in *any manner whatsoever*, including any business connected with the ... transactions which are the subject of this case." (emphasis added). SFREI's attorneys adopted this and other false affidavits in their briefs and at oral argument, knowing that these were not the true facts. At that time, SFREI was represented by the California firm, Landels, Ripley & Diamond, and the New York firm Rogers & Wells.

the litigation against SFREI. A condition precedent to SFREI's liability as constructive trustee was a finding that the TRT trustees had breached their fiduciary duty or Declaration of Trust.

On motion for summary judgment, the district court held that SFREI's liability as constructive trustee could not then be resolved because of numerous fact issues.[5] The stage was clearly set for a trial in which the former TRT trustees would be the key witnesses.

Against this background, SFREI and its attorneys, Skadden Arps, secretly agreed before trial to pay the attorneys' fees incurred by the former trustees and by others in the Gramlich family in preparing for and representing them at trial. Specifically, SFREI agreed to relieve petitioner's key witnesses of a $50,000 liability — without telling the court or petitioner of this deal. Significantly, the existence of the agreements is now beyond dispute. *See* (145a, 158a, 160a)(affidavits of the attorneys for SFREI and the witnesses attesting to the agreements and the payments).

In its August 26, 1986 post-trial opinion in favor of SFREI, the court relied very heavily on the testimony of the former TRT trustees (22a, 23a, 24a, 33a, 34a, 40a, 43a, 55a, 56a).

D. Post-Trial Motions

On August 29, 1986, SFREI moved for an award of attorneys' fees against TLT, as successor-in-interest to TRT, pursuant to a contract executed by SFREI and TRT containing a provision for reasonable attorneys' fees and expenses to "the prevailing party" in litigation between them. The court found TLT liable for SFREI's attorneys' fees and permitted SFREI to file an itemized

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[5] These issues included (1) a breach of the duty of loyalty by the former trustees based on the alleged self-interest of the Gramlich trustees and Stamper and the Gramlichs' control and domination of the other trustees; (2) a breach of the duty of care by the former trustees determined by whether the trustees were properly informed about the values of the buildings in deciding to sell to SFREI and liquidate the trust; (3) a breach of Declaration of Trust Provision Art. III Sec. 14 requiring a majority vote of the non-Gramlich trustees based on whether Stamper was self-interested and the other trustees were controlled and dominated by the Gramlichs; and (4) SFREI's notice of any of the aforementioned breaches.

fee request. *Terrydale Liquidating Trust* v. *Barness*, 645 F. Supp. 920, 925 (S.D.N.Y. 1986). After denying SFREI the attorneys' fees and expenses it had incurred on a limited number of issues, including its personal jurisdiction defense which the court found meritless, the court requested SFREI to submit a supplemental application.

In opposition to that application, TLT formally moved for (i) discovery in contemplation of a motion for new trial because of the prejudice it suffered at trial from the suspected illegal agreement between SFREI and the witnesses; (ii) sanctions against SFREI and its lawyers under Fed. R. Civ. P. 11 (and other provisions) for misconduct in connection with its baseless jurisdictional defense; and (iii) elimination of SFREI's fees in their entirety based upon SFREI's and its attorneys' egregious misconduct and deception of the court as delineated in (i) and (ii) (141a and 143a). In its opposition papers in August 1987, SFREI admitted the agreements and submitted the affidavits of Douglas M. Kraus of Skadden Arps (145a), Steven Umin of Williams & Connoly (158a), and David Welte of Polsinelli, White & Vardeman (160a). The lawyers for the *first time* (approximately one year after trial but before final judgment) admitted they had orally and *secretly agreed before trial* that SFREI would pay the fees and expenses of the two law firms representing the seven key witnesses called by petitioner.

By orally denying petitioner's motion for discovery (195a), the district court prevented petitioner from re-examining the witnesses in light of the agreements and from examining the witnesses' lawyers regarding their pretrial agreements and dealings with SFREI, and from testing Skadden's bald assertions that the payment was not contingent upon the witnesses' testimony. The court allowed petitioner until the next morning to move orally to set aside the judgment and for a new trial (198a). The district court orally denied plaintiff's motion, saying that the result of the trial would have been the same, regardless of the agreements and payments, and that knowledge of the agreement would not have altered its evaluation of the witnesses' credibility (214a). The court so held notwithstanding that its post-trial opinion heavily

relied on these witnesses' trial testimony (22a, 23a 24a, 33a, 34a, 40a, 43a, 55a, 56a). On appeal, the Second Circuit affirmed (1a).

REASONS FOR GRANTING THE PETITION

I. The Petition Raises Questions of Paramount Public Importance

Beyond all doubt, this case represents an extreme departure from the normal course of judicial practice. If it does not -- and if it is standard operating practice for litigants, and their attorneys, secretly to pay the attorneys' fees for their adversary's witnesses or to misrepresent and omit critical facts — this Court must surely rectify the situation. The petition raises the issue of whether an appellate court can countenance a judgment and award of attorneys' fees where a party and its attorneys secretly tamper with an adversary's witnesses and deliberately and repeatedly misrepresent to the court. By allowing respondent to retain its trial judgment, the decision below ignores the fact that the judgment was impermissibly tainted by the nondisclosure of an agreement, negotiated by respondent and its attorneys (officers of the court), which agreement grossly undermined the credibility of the witnesses. By awarding respondent its attorneys' fees, the decision signals the message to these litigants and attorneys, and to all others, that witness tampering and defrauding the court will be tolerated and compensated.

Measured by any standard—ethical, professional, indeed criminal—the course of conduct outlined herein is repugnant to the litigation process. SFREI's promise (through its attorneys) to pay $50,000 in legal fees to the attorneys who coached and represented witnesses called by petitioner cast a cloud over the trial and judgment that cannot be dissipated without a new trial. The prejudicial effect of the agreements and the failure to disclose them is obvious. The existence of the agreements made the testimony of the Gramlichs and of the "independent" trustees, and indeed SFREI's entire presentation, inherently unreliable.

In connection with respondent's frivolous jurisdictional defense, the repeated misrepresentations to, and withholding of material facts from, the court for over one and a half years are nothing less than outrageous. Such intentional deception cannot

be condoned in any manner. The failure to strike the entire request for fees amounts to approval of serious misconduct.

II. Counsel's Tampering With The Impartial Functioning Of The Judicial Process Through A Secret Agreement To Pay The Attorneys' Fees For The Adversary's Witnesses Is A Fraud On The Court Mandating That The Judgment Be Set Aside.

No doubt, Skadden's secret agreement for SFREI to pay the attorneys' fees for petitioner's critical witnesses constitutes a fraud on the court: "a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. . . ."7 *Moore's Federal Practice* para. 60.33 at 60-360 (2d ed. 1987) (footnote omitted). Because the witnesses affected were critical to petitioner's case, the conclusion is inescapable that the misconduct and testimony were highly material.

The integrity of the judicial process requires that a judgment obtained by a deliberately planned and carefully executed scheme to defraud the district court and petitioner be automatically vacated. Accordingly, the rulings below must be reversed for the same reasons stated in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 237 (1943):

> Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. *It is a wrong against the institutions set up to protect and safeguard the public,* institutions in which fraud cannot complacently be tolerated consistently with the good order of society. . . The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id. at 246 (emphasis added).

Here the secret agreement of respondent and its attorneys to pay the attorneys' fees for witnesses called by petitioner was deliberately designed to destroy the neutrality of that testimony. Tampering with witnesses goes to the very heart of the administration of justice and must be condemned without qualification.

As is, the rulings below condone such direct witness payments as legal and proper. The lower courts' failure to condemn the misconduct of respondent's attorneys, Skadden Arps (one of the largest law firms in the country), at a minimum creates the appearance of impropriety, and more importantly grants a license to litigants and their attorneys to engage in blatantly illegal tampering with witnesses resulting in an impermissibly tainted judgment. Thus, the judgment below should be vacated and a new trial granted.

The fraud herein is as egregious as the fraud in *Hazel-Atlas* where the lower court had "*both the duty and the power to vacate its own judgment.*" 322 U.S. at 250 (emphasis added). In *Hazel-Atlas*, the undisputed evidence revealed a "deliberately planned and carefully executed scheme to defraud. . . the Circuit Court" and "under settled equitable principles, [that required] the interposition of equity to devitalize the. . . judgment." 322 U.S. at 245, 247. The petition *sub judice* similarly cries out for an order vacating the judgment and "*a complete denial* of relief" sought by the litigant guilty of fraud. 322 U.S. at 250 (emphasis added).

The impropriety and illegality of an agreement to pay $50,000 to an adversary's witnesses in the form of attorneys' fees are beyond dispute. Federal policy regarding federal witnesses is clear from 18 U.S.C. Sec. 201(c)(2) which prohibits *all* payments direct or indirect in connection with testimony other than statutory witness fees such as for travel, subsistence and loss of time. Such payments should be timely disclosed to the trier of the facts, and counsel should be permitted to examine the effect of large payments upon the witness' credibility. *See, Fund of Funds, Ltd.* v. *Arthur Andersen & Co.* 545 F. Supp. 1314, 1369-1370 (S.D.N.Y. 1982). Thus, at a bare minimum the court and petitioner should have been apprised of the arrangement before trial.[6]

The payment by SFREI of the attorneys' fees of the seven witnesses relieved these witnesses of a $50,000 liability. There can

[6] Agreements to pay fact witnesses compensation in excess of statutory witness fees are void and contrary to public policy and thus unenforceable. *See e.g. Alexander* v. *Watson*, 128 F.2d 627, 630 (4th Cir. 1942).

be no question that by giving this gift (with or without conditions attached) SFREI curried favor with the witnesses.

Further, payment of a witness' attorneys' fees is actually more corrupt than a direct payment to the witness. Here the attorney who is preparing the witness for his testimony is being paid by one of the parties and thus becomes that party's hired gun, thus protecting that party's interests. Therefore, as these lawyers prepared the witnesses for trial and guided their testimony, they were motivated to protect SFREI. The very existence of the agreements secured the witnesses' favor; their lawyers who were paid by SFREI became partners with or agents of SFREI in promoting the SFREI strategy. The attorneys for SFREI and the witnesses were obligated to disclose to the court that the witnesses' attorneys were also representing respondent SFREI who was paying their fees.

Where the trial court relies significantly on the testimony of witnesses in making findings of fact and reaching conclusions of law, and it is thereafter revealed that their testimony has been tampered with by the adversary, the denial of a new trial constitutes reversible error. The credibility of the key witnesses that petitioner called to establish its case has been seriously impugned by the existence and nondisclosure of these unlawful agreements. Failure to grant a new trial where the testimony of key witnesses on critical issues has been impugned constitutes an abuse of discretion. *Harre* v. *A.H. Robbins Co., Inc.*, 750 F.2d 1501 (11th Cir. 1985). Petitioner relied on the testimony of the seven witnesses in presenting its case and after trial learned that their testimony was tainted. Significantly, the untainted testimony of the few other fact witnesses called by petitioner was collateral to that of the witnesses paid by SFREI. Further, the seven witnesses' testimony was not simply repetitive of documentary evidence. Thus, because the corrupt testimony was non-cumulative on key issues, the prejudice cannot be ignored.

The district court's opinion manifests its reliance on the testimony of the Gramlichs and other trustees in making findings of fact and reaching conclusions of law. In addition to the numerous instances in which Judge Sand directly references their testimony (22a, 23a, 24a, 33a, 34a, 40a, 43a, 55a, 56a,), the opinion reflects

that "intricate web of findings" that have been affected by the testimony. *Phillips* v. *Crown Central Petroleum Corp.*, 556 F.2d 702, 705 (4th Cir. 1977), *cert. denied*, 444 U.S 1074 (1980).[7]

Thus, notwithstanding his assertions to the contrary during his bench ruling on August 28, 1987 (200a, 211a-212a), Judge Sand did rely heavily on the testimony of the former TRT trustees. The record seriously impeaches the court's attempt one year later to trivialize the importance of the testimony (22a-24a, 33-34a, 40a, 43a, 55a-56a, *see* 200a-204a, 207a-212a). This Court has made clear that where the trial court relies on certain evidence, it can not disavow that reliance when it is shown after judgment that the evidence is untrustworthy. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238 (1944). In *Hazel-Atlas*, after being apprised of an undisputed "sordid story" of deliberate fraud on the court, the lower court denied relief, in part because the fraud was not "basic" to its decision. On certiorari, the Supreme Court pierced this bald assertion, examined the lower court opinion, and *disagreed* with the court on its reading of its own opinion regarding materiality of the evidence:

> Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion.

322 U.S. at 246-247. Likewise, the opinion of the district court in this case manifests its reliance on the now tainted testimony. The Second Circuit opinion similarly confirms the critical importance of the testimony of the former TRT trustees. That court affirmed the district court's numerous findings of fact which were based on the tainted testimony of the trustees (1a-9a).

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[7] Moreven, on a motion for summary judgment, the district court ruled that the testimony of the TRT trustee witnesses was essential to decide key issues in the case (64a, 82a-92a; *see also* 96a-98a, 125a, 126a-127a n.23-n.24, 132a-133a).

III. The Award Of Attorneys' Fees Of $1.5 Million To Respondent Should Be Stricken. A Litigant And Its Attorneys Who Have Flouted Their Obligations To The Court By Tampering With Witnesses And Misrepresenting Material Facts To The Court Should Not Be Rewarded.

The award of attorneys' fees and expenses to respondent, notwithstanding the egregious misconduct by it and its attorneys, rewards litigants and their attorneys for engaging in blatantly illegal tampering with witnesses and for repeatedly misrepresenting critical facts to the court. Allowing a litigant to recover under a contractual provision as "the prevailing party", where its victory was seriously tainted by corruption and deception on the court, violates the integrity of the judicial process. SFREI has forfeited any claim to reimbursement for attorneys' fees and expenses because both SFREI and its attorneys grossly defaulted in their obligations of honesty and fair play with the court.

Given the repeated instances in which respondent and its attorneys tampered with the judicial process, the rule of law must *require* that the attorneys' fees be denied completely in these circumstances. Litigants and lawyers—large and small—must be aware that if they flagrantly flout their obligations to the court, they will not be rewarded by reimbursement for their attorneys' fees incurred along the way. The award of $1.5 million in attorneys' fees invites and rewards surreptitious tampering with witnesses and blatant deceptions.

In *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238 (1943), this Court announced that upon proof that a successful litigant with the help of its attorneys had perpetrated a fraud on the court, the court had a *duty* to vacate the judgment *and deny all relief. Accord: Keystone Driller Co.* v. *General Excavator Corp.*, 290 U.S. 240, 246 (1933), and *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945).

As a sanction for pretrial misconduct, in failing to answer interrogatories, this Court in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), upheld the dismissal of the complaint. The misconduct in *National Hockey League* is benign when compared to the flagrant fraud in this case.

National Hockey reminds the courts that sanctions including dismissal are necessary for punishment and deterrence:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

427 U.S. at 643. Likewise, dismissal of SFREI's claim for attorneys' fees is a necessary and appropriate sanction[8]

The petition *sub judice* involves respondent's and its attorneys' fraud on the court—their repeated, deliberate deception and concealment of facts conclusively establishing personal jurisdiction and their secret tampering with the petitioner's key witnesses. Thus, "[t]he *total effect of all this fraud,. . . calls for nothing less than a complete denial of relief. . .* " to respondent. *Hazel-Atlas Glass Co., supra,* 322 U.S. at 250 (emphasis added).

In sum, the decisions below grant respondent and its attorneys an exemption from the law as it allows them to engage in serious misconduct and to flout obligations of honesty and full disclosure to the court. They have obtained a judgment tainted thereby and they have been rewarded with an award of over $1.5 million in attorneys' fees. The decisions below doubly reward the litigant who, with its attorneys, has flouted the rules of law, by (1) allowing it to retain its judgment on the merits and (2) granting it attorneys' fees.

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[8] Indeed, *National Hockey League* has been construed as *requiring* dismissal of plaintiff's claim where it has flouted its obligations to the court. *Dellums* v. *Powell*, 566 F. 2d 231 (D.C. Cir. 1977) held that in a class action, it was an abuse of discretion for the district court to reinstate its prior dismissal of plaintiffs' complaint for the failure to comply with discovery. If for no other reason than the prophylactic considerations indentified in *National Hockey League*, this misconduct cannot be tolerated in federal litigation. *Dellums*, 566 F. 2d at 235. *National Hockey League* warns that leniency regarding misconduct creates bad law as it encourages "other parties to other lawsuits" to flout their obligations to the court. Where there are intentional and blatant frauds on the court, more so than where there is a failure to comply with discovery, the district court must deny all relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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